



REPUBLIC OF KENYA



KENYA LAW
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**Njine & another v Flora Printers (Civil Appeal E080 of 2023)
[2024] KEHC 7861 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E080 OF 2023
DAS MAJANJA, J
JUNE 27, 2024**

BETWEEN

FRANCIS GITHINJI NJINE 1ST APPELLANT

PETER MURAGE GITHINJI 2ND APPELLANT

AND

FLORA PRINTERS RESPONDENT

*(Being an appeal from the ruling of Hon. D.W. Mburu (SPM) in
Mombasa CMCC No. E1110 of 2021 dated 30th March 2023)*

JUDGMENT

1. The appeal relates to a ruling on a preliminary objection (“the Objection”) filed by the 2nd Appellant contesting his joinder to the suit which initiated a suit against him out of the time. The Objection was premised on section 4(2) of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya) which requires actions in tort to be instituted within 3 years for any remedies to be granted. The present action being based on the tort of negligence, and the 2nd Appellant having been joined to the suit after the expiry of 3 years, he posits that the suit should fail on that ground.
2. As a brief background, the Respondent filed a Complaint dated 16.07.2021 on 19.07.2021 before the Subordinate Court. He claimed Kshs. 409,580.00 as compensation for special damages incurred to repair motor vehicle registration number KCJ *H against the 1st Appellant. The damage was occasioned by a road traffic accident that occurred on 21.07.2018 between motor vehicle no. KCJ H belonging to the Respondent and motor vehicle registration no. KBT X which, by virtue of the copy of records from the National Transport and Safety Authority (NTSA), the Respondent believed belonged to the 1st Appellant.



3. The 1st Respondent filed an amended defence dated 18.01.2022 disputing ownership of the vehicle. Evidence was introduced by the 1st Appellant which showed that he had sold the motor vehicle to the 2nd Appellant on 08.02.2017 which was way before the accident occurred. Armed with that information, the Respondent moved the court to join the 2nd Appellant to the suit. The 1st Appellant opposed the application on the ground that it offended section 4(2) of the *Limitation of Actions Act* as against the 2nd Appellant. The Court allowed the joinder of the 2nd Appellant on the ground that the same was done under special circumstances being that the evidence pertaining change of ownership of the motor vehicle KBT X was only known between the 1st and 2nd Appellants. The court observed that even with the exercise of due diligence, there is no way the Respondent would have learned about the same but for the divulgence by the 1st appellant. The Respondent was thus allowed to file an amended defence joining the 2nd Appellant to the suit.
4. Once the Amended Plaintiff was served on him, the 2nd Appellant filed the Objection calling upon the court to strike out the suit against him for having been brought out of time. He argued that the suit could only be sustained if the Respondent had first sought leave of court to file the suit out of time. Having failed to do so, he submitted, then the suit must fail.
5. The trial court considered the arguments of the parties and dismissed the Objection on similar grounds that it had allowed the amendment and joinder of the 2nd Appellant thus precipitating this appeal. In his memorandum of appeal, the 2nd Appellant raises 3 grounds of appeal which can be condensed into one. That is whether the trial magistrate fell into error when he allowed the Respondent to pursue a claim for damages in negligence against the 2nd Appellant outside the period of 3 years outlined under the *Limitation of Actions Act* on the basis of existence of peculiar circumstances.
6. The Appellants argued that the Respondent ought first to have sought leave of court to file the suit against the 2nd Respondent out of time. It is not lost to this court that the Respondent indeed sought leave of the subordinate court to join the 2nd Appellant to the proceedings. It was impressed upon the court that the joinder was sought outside the three-year limitation period. To me, allowing the joinder out of time was synonymous to allowing a suit to be brought against the 2nd Appellant out of time. A different application for extension of time would have been superfluous.
7. Part II C of the *Limitation of Actions Act* particularly sections 26 and 27 provide for extension of limitation period on account of fraud or mistake and ignorance of material facts respectively. Section 28 thereof goes on to provide that an application for that purpose must be made as follows:
 28. Application for leave of court under section 27
 - (1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.
8. What is clear from the aforesaid provisions is that a party must apply for leave ex-parte to commence an action. This is a mandatory requirement and as such an application for joinder cannot be a substitute for such an application. Further, the absence of such leave being granted, it was futile for the suit to proceed in the manner contemplated by the trial magistrate.
9. The Appellant's Preliminary Objection was therefore merited as no leave was sought for extension of time under section 28 of the *Limitation of Actions Act*. I allow the appeal and order that the suit before the Subordinate Court as against the 2nd Appellant be struck out with costs.



10. The Respondent shall bear the costs of this appeal assessed at Kshs. 30,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JUNE 2024.

OLGA SEWE

JUDGE

